YUSRI PIALMI

v.

PP

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KANG HWEE GEE JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: J-05-93-2007]
30 DECEMBER 2009

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Failure to call other witness - Whether adverse inference should be drawn*

EVIDENCE: *Witness - Prosecution's failure to offer witnesses to defence - Whether miscarriage or failure of justice*

Following the receipt of information pertaining to drug trafficking activities, the appellant ('the accused') was arrested on 25 February 2005 by the arresting officer ('SP2'). On 10 October 2007, the accused was convicted of the offence of trafficking in 1850.21gm of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952, and sentenced to death under s. 39B(2) thereof. The prosecution had relied exclusively on the evidence of SP2 but took no further steps to call other members of the police party nor offered them to the defence as witnesses. The accused appealed to the Court of Appeal on the ground that the court should invoke s. 114(g) Evidence Act 1950.

Held (dismissing the appeal with costs and affirming the conviction and sentence)
Per Low Hop Bing JCA (Azhar Ma'ah JCA concurring) delivering judgment of the majority:

(1) The court was unable to attribute to the prosecution any conduct of withholding or suppression of evidence. SP2's evidence had revealed the names of all the members of the police party engaged in the raiding operation. There was no concealment whatsoever. The court had no difficulty in holding that s. 114(g) Evidence Act 1950 was inapplicable. *Khoon Chye Hin v. PP* CA (refd); *PP v. Mansor Md Rashid & Anor* FC (refd); *PP v. Tan Kok An* HC (refd); *Abdullah Zawawi v. PP* SC (refd); *Jazuli Mohsin v. PP* HC (refd); *Munusamy v. PP* SC (refd). (paras 11-17)

A **(2)** The learned trial judge had the audio visual advantage and had indeed found SP2 to be a witness of truth. SP2 was not an interested witness, but a police officer performing his duties. He had related to the trial court what he actually saw and did on that day. In the absence of any contradiction by other witness
B or being shaken in cross-examination it was proper and correct for the learned trial judge to arrive at his specific finding of facts. The evidence of SP2 as a police witness was not inherently improbable and such evidence must in the first instance be accepted. *PP v. Mohamed Ali* HC (refd); *PP v. Teh*
C *Cheng Poh* HC (refd). (paras 18-19)

Per Kang Hwee Gee JCA (dissenting):

(1) The learned judge was not bound to draw any adverse inference on the decision of the prosecution in not calling other witnesses
D present at the scene and he was at liberty to rely only on the evidence of one witness with respect to the recovery of the drugs to convict the accused. The unsatisfactory feature of the trial, however, rested on the conduct of the prosecution in not offering to the defence the witnesses it did not call at the close
E of its case without assigning any reason. This failure had given rise to the question of whether the accused had been afforded a fair trial. *Richardson & Others v. The Queen* (refd); *The Queen v. Law Loi On* (refd); *Lee Kuan Woo v. PP* (refd). (paras 21-34)

F **(2)** The prosecution's omission to offer or make available witnesses which they had laid claim to but did not call to give evidence had occasioned a failure of justice which could not be cured under s. 422 of the Criminal Procedure Code. Unless the accused had the opportunity to decide whether or not to call
G any of these witnesses not called by the prosecution to give evidence on his behalf, there would exist a lingering doubt in the mind of this court whether he had been afforded a fair hearing. Although the defence had not objected to the omission, preferring instead to submit on the point of drawing adverse
H inference, the omission had resulted in a failure of justice and the appeal should be allowed. *Kew Foo Mui v. Public Prosecutor* (foll); *Madheshwardhari Singh and Anor. v. State of Bihar* (refd). (paras 35-37)

I

Bahasa Malaysia *Translation Of Headnotes*

Berikutan dengan penerimaan maklumat berkenaan dengan aktiviti-aktiviti mengedar dadah, perayu ('tertuduh') telah ditahan pada 25 Februari 2005 oleh pegawai penangkap ('SP2'). Pada 10 Oktober 2007, tertuduh telah disabit atas kesalahan mengedar 1850.21 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, dan dijatuhkan hukuman mati di bawah s. 39B(2) Akta yang sama. Pendakwaan telah bergantung secara eksklusif atas keterangan SP2 tetapi tidak mengambil langkah seterusnya untuk memanggil ahli-ahli lain pihak polis ataupun menawarkan mereka kepada pembelaan sebagai saksi-saksi. Tertuduh merayu ke Mahkamah Rayuan atas alasan bahawa mahkamah sepatutnya menggunakan s. 114 Akta Keterangan 1950.

Diputuskan (menolak rayuan dengan kos dan mengesahkan sabitan dan hukuman)
Oleh Low Hop Bing HMR (Azhar Ma'ah HMR menyetujui) menyampaikan penghakiman majoriti:

(1) Mahkamah tidak dapat atribut kepada pendakwaan apa-apa perbuatan menahan atau menyekat keterangan. Keterangan SP2 telah mendedahkan nama-nama semua ahli-ahli pihak polis yang terlibat dalam operasi serbuan tersebut. Tidak ada apa-apa penyembunyian langsung. Mahkamah tidak ada apa-apa kesusahan dalam memutuskan bahawa s. 114(g) Akta Keterangan tidak terpakai. *Khoon Chye Hin v. PP* CA (dirujuk); *PP v. Mansor Md Rashid & Anor* FC (dirujuk); *PP v. Tan Kok An* HC (dirujuk); *Abdullah Zawawi v. PP* SC (dirujuk); *Jazuli Mohsin v. PP* HC (dirjuku); *Munusamy v. PP* SC (dirujuk).

(2) Yang arif hakim mempunyai kelebihan pandang dengar dan telah sebenarnya mendapati SP2 saksi yang benar. SP2 bukan seorang saksi berkepentingan, tetapi seorang pegawai polis yang melakukan tugasnya. Beliau hanya memberitahu mahkamah perbicaraan apa yang beliau sebenarnya lihat dan buat pada hari itu. Dalam ketiadaan apa-apa penyangkalan oleh saksi-saksi lain atau digugat semasa pemeriksaan balas ia patut dan betul bagi yang arif hakim perbicaraan untuk mencapai dapatan-dapatan fakta spesifiknya. Keterangan SP2 sebagai seorang saksi polis bukannya memang tidak dapat dipercayai dan keterangan sebegitu mesti pada peringkat pertama diterima. *PP v. Mohamed Ali* HC (dirujuk); *PP v. Teh Cheng Poh* HC (dirujuk).

A **Oleh Kang Hwee Gee HMR (menentang):**

(1) Yang arif hakim tidak semestinya membuat inferens bertentangan atas keputusan pendakwaan dalam tidak memanggil saksi-saksi lain yang berada di tempat kejadian dan beliau bebas
B bergantung pada keterangan seorang saksi sahaja mengenai mendapatkan kembali dadah tersebut untuk menyabit tertuduh. Ciri tidak memuaskan perbicaraan itu, walau bagaimanapun, gantung pada kelakuan pendakwaan tidak menawarkan kepada pembelaan saksi-saksi yang tidak dipanggil olehnya pada
C penutup kesnya tanpa memberi apa-apa sebab. Kegagalan ini membangkitkan soalan sama ada tertuduh telah diberikan perbicaraan yang adil. *Richardson & Others v. The Queen* (dirujuk); *The Queen v Law Loi On* (dirujuk); *Lee Kuan Woo v. PP* (dirujuk).

D **(2)** Ketinggalan pendakwaan untuk menawarkan atau menyediakan saksi-saksi yang mereka telah menuntut tetapi tidak memanggil untuk memberi keterangan telah mengakibatkan suatu kegagalan keadilan yang tidak dapat dibetulkan di bawah s. 422 Kanun Tatacara Jenayah. Kecuali tertuduh mempunyai peluang
E untuk menentukan sama ada untuk memanggil mana-mana saksi yang tidak dipanggil oleh pendakwaan untuk memberi keterangan bagi pihaknya, akan wujud suatu keraguan dalam minda mahkamah sama ada beliau telah diberikan suatu perbicaraan yang adil. Walaupun pembelaan tidak membantah
F ketinggalan tersebut, dan tertumpu sebaliknya pada hujahan atas isu membuat inferens bertentangan, ketinggalan tersebut telah mengakibatkan suatu kegagalan keadilan dan rayuan ini sepatutnya dibenarkan. *Kew Foo Mui v. Public Prosecutor* (diikuti); *Madheshwardhari Singh and Anor. v State of Bihar* (dirujuk).
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Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Adel Muhammed el Dabbah v. Attorney General Palestine [1944] AC 156
H ***(refd)***

Jazuli Mohsin v. PP [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC ***(refd)***

Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***

Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(foll)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Lee Lee Chong v. PP [1998] 4 CLJ 655 CA ***(refd)***

I *Madheshwardhari Singh and Anor v. State of Bihar [1986] AIR (Pat) 324* ***(refd)***

Mraz v. R [1955] 93 CLR 439 ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Tan Kok An [1996] 2 CLJ 96 HC ***(refd)***
PP v. Teh Cheng Poh [1979] 1 LNS 82 HC ***(refd)***
Richardson & Others v. The Queen [1974] Commonwealth Law Report Volume 131 ***(refd)***
The Queen v. Law Loi On, Criminal Appeal No. 663/94

Legislation referred to:
Criminal Procedure Code, s. 422
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), 40(1)
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 5

For the appellant - Shaik Saleem; M/s Shaik Adam & Co
For the respondent - Suzana Atan DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-62-2005]

Reported by Susheila Sreedharan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 10 October 2007, the appellant ("the accused") was convicted of the offence of trafficking in 1850.21gm of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952, and sentenced to death under s. 39B(2) thereof. (A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952, unless otherwise stated).

[2] On 11 November 2009, after hearing the accused's appeal, we arrived at a majority judgment in which Azhar Maah JCA and I concurred, while Kang Hwee Gee JCA dissented. The majority had dismissed the accused's appeal, and affirmed the decision of the learned trial judge. The grounds of the majority judgment now follow.

Finding Of Facts

[3] The learned trial judge's finding of facts may be briefly stated.

[4] On 25 February 2005, at about 4pm, the arresting officer (SP2) received information pertaining to drug trafficking activities along Jalan Besar, Taman Saujana, Johor Bahru, where a male Malay by the name of Yus would be involved between 6 and 8pm.

[5] Acting on this information, SP2 and his police party proceeded by car to the target place at about 6.30pm. They arrived there at 7pm.

[6] SP2 remained in the car which was parked by the side of the road. He kept watch, while his men took their respective positions at designated places.

[7] Subsequently, SP2 spotted a male Malay who was identified as the accused, coming out of a lane by the side of the road. The accused was holding a plastic bag in his right hand. Apart from the accused, no one else emerged from the road. SP2 and his men approached the accused and detained him. When SP2 introduced himself as police, the accused attempted to flee with his plastic bag. A commotion ensued between the accused and the police party. The accused was then arrested by SP2 and his men.

[8] The plastic bag was found to contain two slabs of compressed dried leaves which, upon analysis by the Government chemist, was confirmed as cannabis weighing 1850.21gm.

Section 114(g) Evidence Act 1950

[9] In raising this central and sole issue, learned defence counsel Mr Shaik Saleem submitted that throughout the entire case, the accused had denied that he had been detained and the drug was not with him at the material time. In this regard, he added that the prosecution had relied exclusively on the evidence of SP2 but took no further steps to call other members of the police party nor offered them to the defence as witnesses. He asked the court to invoke s. 114(g). He cited *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC; and *PP v. Tan Kok An* [1996] 2 CLJ 96 HC in support thereof.

[10] Ms Suzana binti Atan, learned deputy public prosecutor, responded as follows:

(1) Even without offering witnesses from the police raiding party, the prosecution's case is complete with the evidence of SP2; and there is no miscarriage of justice as evidence for the prosecution is credible and ought to be believed, in view of:

(a) *PP v. Mohamed Ali* [1962] 1 LNS 129 HC; and

(b) *PP v. Teh Cheng Poh* [1979] 1 LNS 82 HC;

(2) There is no withholding or suppression of material evidence and so s. 114(g) does not apply, on the basis of:

(a) *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 FC;

(b) *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 50; [1987] CLJ (Rep) 221 SC;

(c) *Khoon Chye Hin v. PP* [1961] 1 LNS 41;

(d) *Lee Lee Chong v. PP* [1998] 4 CLJ 655 CA; and

(e) *Jazuli Mohsin v. PP* [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC.

[11] As the central and core issue raised in the instant appeal revolves around the interpretation and ambit of s. 114(g), it is pertinent for us to embark upon an analysis of the authorities cited for the defence and the prosecution.

[12] A good starting point is to be found in *Khoon Chye Hin, supra*, Thomson CJ (later LP), speaking for the (then) Court of Appeal, approved of the trial judge's statement to the effect that you can draw no inference against the prosecution from the fact that the prosecution had not called a particular witness. The learned Chief Justice emphasized that provided there is no wrong motive in a criminal case, prosecuting counsel has a discretion whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth.

[13] In *Mansor Md Rashid, supra*, Chong Siew Fai CJ (S&S) (as he then was) held that the drawing of adverse inferences pursuant to s. 114(g) is not a matter of an inflexible rule but depends on the circumstances of each particular case. The question to consider is whether the existence of a fact or state of things makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the

A circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognised mode of proving it, and the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned. Hence, no adverse inferences should be drawn
B against the prosecution for the non-production of two persons *viz* Cholar and Amran there, as they were not material to the point in issue, as the basis of the prosecution's case to substantiate the charge was on the "sale of cannabis resulting from negotiations."

C **[14]** Section 114(g) may however be invoked eg, in *Tan Kok An, supra,* where an important witness, the "umbilical cord to link the accused with the heroin", and another person Sow Kiong, whom the prosecution had featured in cross-examining the accused, were not called as prosecution witnesses: per Abdul Malik Ishak J (now JCA).

D **[15]** In *Abdullah Zawawi, supra*, at the trial, there were some unsatisfactory features showing that the case against the accused fell short of proof beyond reasonable doubt. Two witnesses, *viz* the assistant manager and the office boy, were not called as prosecution witnesses. Salleh Abas LP (as he then was) held that where the
E prosecution evidence falls short of proving a prima facie case, the right not to call such witnesses and to make them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters at the trial, the prosecution must close this gap. It is not for the defence to call or use offered witnesses to
F supplement the prosecution's case. Hence, the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof. See also *Jazuli bin Mohsin, supra,* Wan Yahya J (later SCJ).

G **[16]** In *Munusamy, supra,* Mohamed Azmi SCJ (as he then was) in delivering the judgment of the (then) Supreme Court stressed that it is essential to appreciate the scope of s. 114(g), lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence
H and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case. (emphasis added). The Supreme Court held that adverse inference
I under s. 114(g) does not apply to:

(1) the failure by the prosecution to call an informer who was protected under s. 40(1) (see also *Lee Lee Chong, supra*); A

(2) the prosecution's dispensation with the calling of the typist to explain the typing error on the envelope containing the chemist report which was addressed to the OCPD "Sungai Siput" and not to the OCPD "Taiping" ie, the place of the offence, since the error had been explained by the investigating officer and the Government chemist; and B

(3) non-production of the chemist's certificate of testing the weighing instrument, when there was a certificate dated 31 May 1985 from the Inspector of Weights and Measures. C

[17] Reverting to the instant appeal, we observed that learned defence counsel has noticeably refrained from suggesting the existence of the essential element of withholding or suppression of evidence by the prosecution. Indeed, we are unable to attribute to the prosecution any conduct of withholding or suppression of evidence. In fact SP2's evidence has revealed the names of all the members of the police party engaged in the raiding operation. There was no concealment whatsoever. We therefore had no difficulty in holding that s. 114(g) was inapplicable. D E

Credible Evidence

[18] The learned trial judge had the audio visual advantage and had indeed found SP2 to be a witness of truth. SP2 was not an interested witness, but a police officer performing his duties. He had related to the trial court what he actually saw and did on that day. In the absence of any contradiction by other witness or being shaken in cross-examination, it was proper and correct for the learned trial judge to arrive at his specific finding of facts. He is entitled to do so: see eg, *Teh Cheng Poh, supra*, per Gunn Chit Tuan J (later CJ (M)). The evidence of SP2 as a police witness is not inherently improbable. Such evidence must in the first instance be accepted, as SP2 was not saying that he saw a cow jumping over the moon: per Thomson CJ (later LP) in *Mohamad Ali, supra.* F G H

Conclusion

[19] On the foregoing grounds, we dismissed this appeal and affirmed the conviction and sentence. I

Kang Hwee Gee JCA:

[20] I have read the judgment of my learned brother Low Hop Bing JCA in draft and I agree entirely with the principle of law expounded therein with respect to the drawing of adverse inference under s. 114(g) of the Evidence Act 1950 and the conclusion reached that no such inference can be drawn.

[21] On the evidence as presented before the High Court, I fully agree that the learned judge was not bound to draw any adverse inference on the decision of the prosecution in not calling other witness present at the scene and that he was at liberty to rely only on the evidence of one witness with respect to the recovery of the drug to convict the accused.

[22] The unsatisfactory feature of the trial however, rests not on whether adverse inference should be drawn, but on the conduct of the prosecution in not offering to the defence the witnesses it did not call at the close of its case without assigning any reason. These witnesses had given statements and were on the witness list which had been supplied by the prosecution to the defence and the court and they included members of the arresting party who if called, might be able to describe how the drugs were recovered from the accused. Their evidence was all the more important in view of the fact that only one witness was called by the prosecution to describe how the drug was recovered which was disputed by the accused.

[23] It has always been the practice that the prosecution at the close of its case, offer or make available to the defence, witnesses whom it did not call to give evidence but whose statements had been recorded in the course of police investigation. The practice has the force of procedural law to ensure that an accused is afforded all the means at his disposal to call any witness to testify on his behalf. The prosecution's failure in not offering or making them available under the circumstances has given rise to the question of whether the accused had been afforded a fair trial. It is a threshold issue affecting jurisdiction which may render the trial invalid.

[24] There is a dearth of local authorities with respect to the duty of the prosecution to offer to the defence witnesses from whom statements have been taken but are not called to testify and the consequence that may arise. It may be necessary to refer to case law from other common law jurisdictions which may provide persuasive authority on the issue.

[25] The High Court of Australia (on appeal from the Supreme Court of the Australian Capital Territory) in *Richardson & Others v. The Queen* [1974] Commonwealth Law Report Volume 131 at 116 (Barwick CJ McTiernan and Mason JJ) confirmed the well accepted general principle already known in our jurisdiction that the prosecution has a wide discretion to call to trial witnesses from whom statements had been taken and that the defence cannot dictate the conduct of the prosecution case and that its decision not to call a particular witness can constitute a ground to set aside a conviction in favour of a new trial only if it can be construed as a misconduct which gave rise to a miscarriage of justice. The court went on to approve what the Privy Council said of the duty of the prosecutor in *Adel Muhammed el Dabbah v. Attorney General Palestine* [1944] AC 156 at 169 that:

> It is consistent with the discretion of counsel for the prosecutor, which is thus recognized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, and this practice has become even more general in recent years, and rightly so, but it remains a matter for the discretion of the prosecutor.

[26] In the Hong Kong Court of Appeal case of *The Queen v. Law Loi On*, Criminal Appeal No. 663/94, Law was charged with the offence of wounding one of three brothers who had visited a flat on the 1st floor of a building. Evidence was presented by the prosecution that Law had knifed one of the brothers and had called upon persons in the flat to arm themselves. Law denied the prosecution's account of the event, claiming instead that it was the brothers who came to the flat armed with knives and that they had chased after him.

[27] Statements were recorded from three persons who were with Law at the flat which supported his account. Their statements were included in a bundle sent to counsel for the accused and witnesses summons were issued which led the defence to believe that they would be called to give evidence at the trial. The prosecution decided not to call them to give evidence but only informed the defence of its intention on the day of hearing just before the trial began.

[28] The court (Mortimer and Mayo, JJA, and Keith, J) accepted the principle in *Richardson*. However, it went a step further to examine the conduct of the prosecution in offering the witnesses to

A the defence at the eleventh hour, the effect of which was to deny the defence the opportunity to interview the witnesses and to decide whether to call them. It found that the prosecution had in fact "laid claim" to the witnesses. To "lay claim" in the context of the criminal trial procedure obtaining in Hong Kong meant, listing
B names of the witnesses in the back of the indictment of trials in the High Court or of the summary of facts in trials in District Court or informing the judge of its intention to call the witnesses at the pre-trial stage, or generally leading the defence to believe that it had "laid claim" to such witnesses.

C

[29] It held that in such a case where the prosecution had laid claim to witnesses, it must call them or at least offer them for cross-examination save where it is plain from the statement recorded that they were not credible witnesses. Its failure to call them to
D give evidence was under the circumstance a material irregularity in the course of the trial.

[30] The rationale for the judgment is to be found at para 15 per Keith, J:

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> However, once the decision has been relayed to the defence different considerations apply. Since the prosecution has "laid claim" to that witness, the defence is unlikely to contemplate taking a statement from the witness, and will not make any arrangements to bring the witness to court. Thus where the prosecution has notified
F the defence of its intention to call a particular witness (for example, by naming the witness on the back of the trial in the High Court), it becomes the duty of the prosecution to call that witness, even though the evidence which he is going to give is inconsistent with the case which the prosecution has to prove. The prosecution has a discretion as to whether it examines that witness or merely
G tenders him for cross-examination, though that discretion must be exercised in a manner which is fair to the defence and is calculated to further the interest of justice. The only exception to the rule requiring the prosecution to call such a witness is where it appears to counsel for the prosecution that the witness is no longer a credible witness worthy of belief.

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[31] The cases illustrate the extent to which courts subscribing to the adversarial system of trial under the common law are prepared to intervene, to ensure that an accused receives a fair trial. The practice of making available or offering witnesses to the defence at
I the close of the case for the prosecution goes far beyond "invoking the often-quoted presumption of adverse inference under s. 114(g) of the Evidence Act" as alluded to by Salleh Abas LP in *Abdullah*

Zawawi Omar v. Public Prosecutor [1985] 2 CLJ 2; [1985] CLJ (Rep) 19. It primarily meant to ensure that an accused person facing trial in a court of justice is afforded all reasonable means and opportunity to defend himself by calling any witness to testify on his behalf who may support his innocence.

[32] Indeed, the right to a fair trial exists not only in the abstract mind of judges. It was found by the Federal Court recently, in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 (Richard Malanjum CJ Sabah & Sarawak, Hashim Yussof FCJ, and Gopal Sri Ram FCJ) to reside in art. 5 of the Federal Constitution, at para 18:

> Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art. 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State action that is fair both in point of procedure and substance. Whether an impugned State action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case.

[33] The Federal Court referred to and approved what Edgar Joseph Jr J (as he then was) said on the subject in the following passage of his judgment in *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid)* (*Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

[34] The issue before the Federal Court in *Lee Kwan Woh* (or Woo?) was the denial of the right of the accused to make at the close of the case for the prosecution a submission of no case to answer which the Federal Court found for the defence. *A fortiori*, in the instant case which turns on the failure of the prosecution to offer or make available witnesses who would be able to give evidence

with respect to the recovery of the drugs given that only one of the many in a group of police officers who witnessed the unfolding of the narrative gave evidence.

[35] The omission on the part of the prosecution to offer or make available witnesses which they had laid claim to but did not call to give evidence in my considered view has occasioned a failure of justice which cannot be cured under s. 422 of the Criminal Procedure Code. The Federal Court in *Kiew Foo Mui & Ors v. Public Prosecutor* [1996] 1 CLJ 14, found the expression "failure of justice" in s. 422 of the Criminal Procedure Code synonymous with "miscarriage of justice". It approved of what Fullagar J of the High Court of Australia said of an equivalent provision in s. 6 of the New South Wales Criminal Appeal Act 1912 in *Mraz v. R* [1955] 93 CLR 439 at 514 that:

> It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

[36] On my part, I am constrained to find against the views of my learned brothers that unless the accused had the opportunity to decide whether or not to call any of these witnesses not called by the prosecution to give evidence on his behalf, there would exist a lingering doubt in the mind of this court whether he had been afforded a fair hearing.

[37] I am acutely aware that the appeal record did not appear to show that the defence had objected to the omission, preferring instead, to submit on the point of drawing adverse inference. I am convinced however, that there was no underlying motive on the part of the defence why the point was not taken at the trial. I am convinced that the omission was due to the failure to appreciate its implication by reason of the unfamiliarity with this aspect of the

law by all concerned. Nonetheless, the omission has resulted in a failure of justice and in the words of Sandhawalia, CJ in *Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324, referred to earlier, should lead to "the charges levelled against him (to) fall to the ground" and to result in his "unconditional release".

[38] I would allow the appeal.